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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4388 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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PRATAPLAL BHAGWANJI BOLIWAL THRO'NEPHEW RAJKUMAR R BOLIWAL
Versus
STATE OF GUJARAT

Appearance:
1. Special Civil Application No. 4388 of 2001
MR HR PRAJAPATI for Petitioner No. 1
MR HL JANI ADDL GOVERNMENT PLEADER for Respondent No. 1-3
MS PJ DAVAWALA for Respondent No. 4

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 09/08/2001

ORAL JUDGEMENT

Heard learned advocate Mr. Prajapati for the petitioner and Mr. Jani, learned AGP for the respondent State and Ms. P.J. Davawala, learned Addl. Standing Counsel for respondent NO.4. In this petition, the

petitioner has challenged the impugned order of detention dated 24th March, 2001 passed by the District Magistrate, Surat under the provisions of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 ("the PBM Act" for short) The grounds of detention have been communicated to the petitioner. In this petition, the respondent State has filed affidavit in reply, Respondent NO.4 has filed affidavit in reply and the detaining authority has also filed affidavit-in-reply.

Learned advocate Mr. Prajapati for the petitioner has raised various contentions but according to him, one contention is enough for setting aside the impugned order of detention. He has submitted that looking to the grounds of detention, the detaining authority has considered the provisions of section 7 and 12AA of the Essential Commodities Act, 1955. He has, therefore, submitted that the relevant section 12AA was not in existence when the impugned order of detention has been passed by the detaining authority. According to him, it amounts to non application of mind on the part of the detaining authority when he considered the relevant provisions of section 12AA of the Essential Commodities Act, 1955 ("the EC Act" for short) which was not in existence in the statute at the time of impugned order. He has submitted that it is total non application of mind on the part of the detaining authority in considering the aspect of taking steps u/s.12AA of the EC Act. He has submitted that section 12AA was inserted in the Statute book by amendment of 1982 in the principal Act for a period of five years initially and, thereafter, it was extended from time to time and in the year 1997, said amendment has lapsed as no extension has been given by the legislature. On this ground, he has submitted that the impugned order of detention is required to be quashed and set aside.

I have considered the submissions made by the learned advocates for the parties. I have also considered the grounds of detention communicated to the petitioner wherein the detaining authority has considered this relevant provision namely section 12AA of the EC Act.

Learned AGP Mr. Jani has submitted that considering the provisions of law, which is not in existence, which will not adversely affect the legal right of the petitioner and therefore, no prejudice cause to the petitioner. He also submitted that Section 12AA though which not in force at the relevant time, the same

was considered as less drastic remedy by the detaining authority, it may not be considered to be non application of mind on the part of the detaining authority. However, the same is not having any effect or adverse result on the legal right of the petitioner and therefore, the order of detention is legal and valid. It is also submitted that considering the relevant provisions of Section 12 AA of the act, cannot be considered as non application of mind and in such situation, no interference in the detention order is required.

Learned Addl. Standing Counsel Ms. P.J. Davawala has submitted that the impugned order of detention has rightly been passed by the detaining authority after taking into consideration all the facts and circumstances of the case and that the order is just, legal and proper and this court should not interfere with the same.

I have considered the submissions made by the learned advocates for the parties. Looking to the grounds of detention, page 30 (internal page 7), while considering the lesser drastic remedy, the detaining authority has also considered the provisions of sec.12AA and was of the view that the action could be taken against the detenu but in view of the serious type of criminal activity of the detenu, the detaining authority was of the view that such type of proceedings would be a time consuming proceedings and if such steps are taken, then, the detenu, by getting released on bail from the court, may continue such type of criminal activity. Therefore, the detaining authority has not thought it expedient to take steps under sec.12AA of the Act but to detain the detenu under the PBM Act. It is also clear that the provisions of section 12AA were inserted in the EC Act by way of amendment in the year 1982 and has remained in force upto 1997 and, thereafter, these provisions have not continued in the Statute and, thus, at the time of passing of the impugned order of detention, such provisions were not in existence. However, same has been considered by the detaining authority. This shows total non application of mind on the part of the detaining authority and on this ground alone, the impugned order of detention is required to be quashed and set aside.

It is also necessary to note that the petitioner

has raised specific contention in ground [q] on pg.16 and the detaining authority has given reply in para-16, wherein, the detaining authority has submitted that Section 12 and 12[a] of the Essential Commodities Act, 1980 are in force, which are pertaining to breach of Section 3 of the Essential Commodities Act. It is further submitted that Section 12[aa] of the Act has been repelled from the Act and hence action is to be taken under the said Section 12 and 12[a] of the said Act. However, this reply given by the detaining authority seems to be an afterthought. Looking to the grounds of detention pg.13 - internal pg.7, the detaining authority has considered Section 7 as well as Section 12 AA as lesser drastic remedy which clearly shows that option which is available to the detaining authority in respect of lesser drastic remedy, has not been effected because of the reason that if the petitioner approaches the Special Court for bail and if bail is granted by the court then, similar activities may be continued by the petitioner. Therefore, to take into consideration the provisions which were not in existence as an option by the detaining authority as lesser drastic remedy, according to my opinion, it amounts to total non application of mind while passing the detention order. In such situation, it is the duty of the detaining authority to apply its mind while passing the detention order and the relevant provisions of the law ought to have been considered and not the irrelevant.

It is also pertinent to note that in an identical case, the co-detenu - Babubhai Marwadi @ Himmatsinh Rajput who has preferred Special Civil Application No.3403 / 2001 has been released and the detention order has been quashed and set aside. Since in the case on hands, the present petitioner has also challenged the detention order which also came to be passed against the co-detenu and when the co-detenu has been released, the present petitioner deserves to be released.

For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention dated 24.3.2001 is vitiated and resulted to quash and set aside. The detenu - Prataplal Bhagwanji Boliwal who has been detained at Special Jail Navsari be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is Permitted.

Dt.09.8.2001. (H.K. Rathod,J.)

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